SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(312) 853-7237

WRITER'S E-MAIL ADDRESS
dcarpent@sidley.com

EX PARTE

February 4, 2003

ELECTRONICALLY FILED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 96-98; Appropriate Framework of Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33.*

Dear Ms. Dortch:

This letter is filed on behalf of AT&T Corp. in response to the *ex parte* letter jointly submitted by BellSouth Corp., Qwest Communications International Inc. and SBC Communications Inc. ("RBOCs") on January 21, 2003 ("RBOC letter"). In that letter, the RBOCs ask the Commission to adopt rules in this proceeding that would override the "change of law" provisions that are features of all or virtually all of the existing interconnection agreements between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") and that generally were proposed by and voluntarily agreed to by ILECs.

In particular, the RBOCs propose that the Commission's Order in this proceeding should "address" the effect that a Commission decision that "a previously provided network element does not meet" the Commission's construction of the "necessary" and "impair" standards of 47 U.S.C. § 1251(d)(2) would have under existing change of law provisions and to establish a "uniform national transitional plan" that would "override any change-of-law provisions" by prohibiting the provision of that element beyond some specified date. RBOC Letter, at 1-2. The RBOCs contend that such action is necessary and proper because CLECs could purportedly otherwise use the change of law provisions to "extend the prior unbundling regime indefinitely." *Id.* at 1. The RBOCs assert that the any such result would be "in direct conflict" with the D.C.

Circuit's *USTA* decision which they claim established that the prior unbundling regime was "unlawful and contrary to congressional intent *ab initio*" – and also with the Commission's findings under the necessary and impair standards. RBOC Letter, at 1-2 & 4. The RBOCs assert that in these circumstances the *Sierra-Mobile* doctrine gives the Commission the authority to override provisions of state interconnection agreements.

As explained in detail below, these proposals are baseless. First, the short answer to the RBOCs is that their proposal is outside the scope of these proceedings and barred by the Administrative Procedure Act, for the Notices of Proposed Rulemaking nowhere proposed rules that would override the change of law provisions. They did not do so because the evidence was, and is, that the change of law provisions would fully protect all of the parties' legitimate interests in the event that prior rules were vacated.

Second, the Commission has no authority under the *Sierra-Mobile* doctrine to override the change of law provisions and to impose specific deadlines on State commissions for eliminating access to particular network elements. The *Sierra-Mobile* doctrine permits a federal agency to override provisions of an agreement only if the agreement is within the federal agency's exclusive jurisdiction and its provisions have been been rendered contrary to the public interest by unforeseen intervening developments. None of these conditions exist. There has been no unforeseen development. To the contrary, the change of law provisions were developed to address the very type of change in the law that the RBOCs predict will now occur. And, because the change of law provisions were adopted to allow modifications of agreements when prior rules are vacated, the Commission cannot override the provisions on the theory that it would be "correcting the consequence of [its] vacated rules." RBOC Letter, at 4-5.

In any event, the *Sierra-Mobile* doctrine is inapposite, for the Telecommunications Act gives jurisdiction over interconnection agreements to State commissions, and the Commission is authorized to exercise jurisdiction over interconnection agreements only if State commissions fail to act. § 252(e)(5). In this regard, while the Act provides that minimum requirements that the FCC's regulations impose are binding on states, the Act and the uniform federal court of appeals' decisions specifically provide that states may impose additional unbundling requirements under either state or federal law. Thus, one legitimate purpose served by change of law provisions is to allow State commissions to decide if state law or other provisions of federal law warrant maintaining an unbundling requirement following vacatur of a federal rule.

1. As noted, "change of law" provisions are features of virtually all existing interconnection agreements. Although there are various types of these provisions, they all share the objective of permitting interconnection agreements to be modified when there has been a change in a provision of the law that operated as one of the premises for the interconnection agreement; for example, the vacatur of a rule that provided legal standards that were applied in the arbitration and approval of the agreement. In the event of such a change of law, interconnection agreements generally provide that parties will attempt to negotiate appropriate

modifications to the agreements and that, if those efforts fail during a specified period (normally 30-60 days), the dispute will be taken to the State commission, which, on an expedited basis, will determine the appropriate modification, if any.

In AT&T's experience, the change of law provisions in current interconnection agreements were generally proposed by ILECs, voluntarily agreed to by the parties, and were not arbitrated. In particular, the RBOCs proposed them, and agreed to change of law provisions, both before and after the Triennial Review and other pending proceedings were instituted. For example, the RBOCs have consistently included change of law provisions in the model interconnection agreements that they have drafted and that they offer to competing carriers in the course of negotiations, and in their statements of generally available terms (SGATs) offered pursuant to Section 251(f). The RBOCs included change of law provisions in their initial interconnection agreements that were established in 1996 and 1997 and sought these same clauses after the initial agreements expired and when new agreements were established.[1] And the RBOCs continue to propose and negotiate these change of law provisions throughout the period of time in which they were appealing the *UNE Remand* and *Line Sharing Orders* and proposing that the Commission remove all or virtually all network elements from the national list in this Triennial Review proceeding. The RBOCs thus quite plainly drafted and negotiated the provisions with the intent and understanding that they would apply in exactly the circumstances that the RBOCs now seek to avoid.

In this regard, the existing change of law provisions were expressly *not* predicated on the validity of the Commission's prior unbundling rules. Quite the contrary, these change of law clauses were insisted upon by RBOCs precisely because they were seeking to vacate these rules in their appeals of the Commission's *UNE Remand* and *Line Sharing Orders* and because they wanted to be able to seek modification of their interconnection agreements if and when their challenges were successful. And it is quite clear that the change of law clauses provide the RBOCs with precisely what they bargained for: the ability to argue that the vacatur of these rules through the adoption of new superceding Commission rules entitles the RBOCs to modification of the interconnection agreements that were negotiated or arbitrated on the basis of these rules. At no time prior to the issuance of the Notices of Proposed Rulemaking that instituted these proceedings – and at no prior time in these proceedings – did the RBOCs even

---

[1] The RBOCs' repeated suggestion, RBOC letter at 3, 5, that the Commission should act because some of their interconnection agreements may lack change of law provision is a misleading irrelevancy. AT&T's own interconnection agreements with RBOCs overwhelmingly contain change of law provisions – in large part because, as noted, the RBOCs have generally pressed for inclusion of these provisions. The RBOCs clearly anticipated relying upon these provisions in nearly all cases, not least because they were simultaneously seeking changes to the Commission's order, and their choice to omit the provision in particular cases (to the extent any such cases exist) is no basis for Commission action here.

once suggest that the change of law provisions were not perfectly adequate vehicles for addressing all of their legitimate interests. And it is presumably for this reason that the NPRMs did not raise any issues involving the change of law provisions, much less propose rules that would override them. To the contrary, the litigation over the new rules has occurred on the premise that they would be subject to the change of law provisions of the interconnection agreements once the new rules were adopted.

2. The Administrative Procedure Act thus bars the Commission from adopting the RBOCs' proposal that the Commission override contractual change of law provisions in this proceeding. Under the APA, the Commission cannot adopt rules that would eliminate, override, or alter the change of law provisions in interconnection agreements unless the Commission provides adequate notice of its intentions to promulgate such a rule and affords the opportunity for interested parties to comment.[2] The Commission has not done so. The NPRM provides notice and requested comment on proposals to modify the Commission's rules implementing Sections 251(c)(3) and 251(d)(2) of the Act, but nowhere remotely seeks comment upon proposals that would affect the change of law provisions of interconnection agreements. Further, while there is no provision of § 252 of the Act that gives the Commission authority to override change of law provisions in existing state-approved interconnection agreements (*see infra*), the NPRM did not address the provisions of § 252 that relate to the negotiation and approval of even new interconnection agreements, much less propose rules to affect existing agreements that were previously approved. Because the parties designed the change of law provisions to address a potential change in Commission rules, and because the change of law provisions result from the parties' agreement and from the operation of state law, no party could reasonably have anticipated that the Commission would undertake to review change of law provisions in a proceeding designed to address the scope of unbundling obligations.[3]

And the reality is that the Commission could not responsibly undertake to consider rules that would override change of law provisions in interconnection agreements, unless it provided clear notice of its intent to do so and solicited comments on whether and how the change of law provisions would and would not apply in the particular circumstances at issue here. The terms of the agreements are not part of the records in these proceedings and interconnection agreements embody a wide variety of change of law provisions, with different legal standards, treatment of contingencies, and negotiation and review provisions. AT&T itself has entered into an array of

---

[2] *See* 5 U.S.C. §§ 553(b) ("General notice of proposed rule making shall be published in the Federal Register …"), 551(5) (rulemaking is "agency process for formulating, amending or repealing a rule"); *Sprint Corp. v. FCC*, 2003 WL 139438, at 4-5 (D.C. Cir. Jan. 21, 2003).

[3] *See, e.g., National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (final rule must be "logical outgrowth" of agency proposal); *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994).

change of law provisions, and other competitive carriers presumably reached still different outcomes in their negotiations. The appropriateness of these myriad different provisions cannot be resolved in a non-arbitrary fashion in the abstract or through application of a generally applicable principle. They certainly cannot be resolved without notice to the parties and the opportunity to be heard regarding the peculiarities of each particular provision.

3. Even if the issue had been raised in the NPRMs, there is no basis for the Commission to adopt rules in this proceeding that would override the change of law provisions and impose a "uniform, national transition plan." The RBOCs' claims that the Commission has the authority to override these agreements rest on the so-called *Sierra-Mobile* doctrine.[4] The RBOCs assert that the doctrine "arguably" gives the Commission the authority to negate any provision of any interconnection agreement that the Commission finds to be contrary to the public interest (RBOC Letter at 3), and the RBOCs claim that the Commission has the clear authority to override the change of law provisions because the Commission putatively would here be "'correct[ing] the consequences of [its] vacated rules'" from the *UNE Remand* and *Line Sharing* orders. *Id*. The RBOCs also rely in some unspecified way on the Commission's authority under § 201 to adopt rules to implement requirements of § 252(e)(2) of the Act. *Id*. at 5. None of these claims has the slightest substance.

The *Sierra-Mobile* doctrine applies to regulatory regimes in which privately negotiated contracts are filed with a federal agency and are subject to its plenary authority. The general rule is that a regulated utility that enters into such contracts is not "entitled to be relieved of its improvident bargains," but that agencies can grant such relief when intervening circumstances which were not foreseen at the time the contract was formed mean that prospective enforcement of the contract in accord with its terms is no longer in the public interest.[5] The necessary conditions for applying *Sierra-Mobile* are not present here, for three reasons.

First, the proposal that the Commission override the change of law provisions and mandate an end to access to particular network elements by particular dates would invade the jurisdiction that the Act confers on State public utility commissions. Under the Act, interconnection agreements are filed with State commissions, not the Commission, for the agreements are subject to state jurisdiction, and the Commission therefore plainly does not have plenary authority to regulate all the rates, terms, and conditions in interconnection agreements. To be sure, § 252(c)(1) requires the states to comply with the Commission's regulations that implement the requirements of § 251, and, as the RBOCs correctly state (RBOC Letter at 5), §

---

[4] *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1955); *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 344 (1956).

[5] *Sierra*, 350 U.S. at 355; *see Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 710 (CADC 2000).

201 of the Act gives the Commission authority to adopt regulations that implement and define the provisions of § 252(e)(2) that allow state commissions to decline to approve negotiated agreements that are discriminatory or contrary to the public interest and to disapprove arbitrated agreements that violate § 251. But these Commission regulations establish only *minimum* standards to which State commissions must abide. In particular, § 252(e)(3) of the Act provides (subject only to § 253 preemption of state law entry barriers) that "nothing in this section [252] shall prohibit a state commission from establishing or enforcing other requirements of state law" in the interconnection agreements that it arbitrates and enforces (or the negotiated agreements that it approves). Whether or not Commission regulations authorize particular unbundling requirements, the requirements can be imposed under state law so long as they are not inconsistent with the requirements and purposes of the Act itself. *See* §§ 251(d)(3) & 261(b).

Courts of appeals have uniformly applied this principle to uphold state authority to maintain specific unbundling requirements after the specific Commission rules that had mandated them were vacated. The courts held that, under the Hobbs Act, the vacatur of a prior commission rule simply meant that the particular unbundling obligation was no longer *required* by a Commission regulation. These courts held that the State commission was then entitled to consider whether to order the continuation of the unbundling requirement on the basis of state law or on the basis of the State commission's own understanding of the requirements of section 251 of the Act. As the courts recognized, any such state order would be upheld so long as it was not inconsistent with the requirements of the Act, and, in determining the consistency of the state requirement with the Act, the courts have held that they are not bound by interpretation of the Act made by the court of appeals that vacated the prior rules.[6]

For this reason, any attempt by the Commission to negate the change of law provisions and to mandate that State commissions eliminate access to particular unbundled elements by a particular date would exceed the Commission's jurisdiction under the Act. Regardless of what the Commission's rules provide, State commissions retain the authority to determine whether access to network elements should be required under state law (or other provisions of federal law), and the Commission cannot prevent State commissions from making such determinations. The change of law provisions are valid incidents to the authority reserved to the states under § 252(e)(3) of the Act, for the change of law provisions are negotiated and State commission-approved mechanisms that allow the State commissions to determine whether, following vacatur of a rule by a court or by the Commission, the same underlying unbundling requirement should be maintained under state or federal law.

---

[6] *Southwestern Bell Tel. Co.* v. *Waller Creek Communications*, 221 F.3d 812, 820 (5th Cir. 2000); *MCI* v. *U S West*, 204 F.3d 1262, 1268 (9th Cir. 2000); *U S West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999); *U S West Communications, Inc.* v. *Hamilton*, 224 F.3d 1049, 1056-57 (9th Cir. 2000).

In this regard, it is baffling that the RBOCs attempt to rely (RBOC Letter at 5) on the Commission's authority to adopt regulations defining conditions under which states can reject *new* interconnection agreements under § 252(e)(2) on the grounds that they are discriminatory, contrary to the public interest, or contrary to § 251. The change of law provisions here are features of *existing* agreements that previously were approved, so § 252(e)(2)'s criteria are quite irrelevant here. Further, whatever the meaning of § 252(e)(2), § 252(e)(3) says that "nothing in this section [252]" can prohibit states from establishing additional requirements under state law. There is simply no basis for the Commission to assert jurisdiction to negate or otherwise override the change of law provisions in existing interconnection agreements.

Second, even if the Commission had jurisdiction, the *Sierra-Mobile* doctrine would not permit it to override the change of law provisions. The showing the agency must make before invalidating a contractual provision has been characterized as a "heavy burden" that is "much more restrictive" than an ordinary public interest finding in other contexts.[7] The Commission has explained that "[t]here is a well-established reason why the *Sierra-Mobile* standard for contract reformation is high: preserving the integrity of contracts is vital to the proper functioning of the carrier-to-carrier communications market."[8] At a minimum, the doctrine requires "particularized" findings justifying recasting a contract,[9] and courts "stress that generic *Mobile-Sierra* findings are appropriate only in rare circumstances."[10]

Here, the Commission could not possibly satisfy the doctrine's heavy burden. The vacatur of the old rules and the adoption of new ones affords no possible basis for overriding the change of law provisions contained in hundreds of varied contracts between a wide variety of parties. The simple fact is that the change of law provisions were *designed* to address the very intervening circumstance that that gives rise to the RBOCs' plea: the vacatur of the *UNE Remand* and *Line Sharing Orders* and the adoption of new unbundling rules. The RBOCs have provided no conceivable basis for obtaining relief from the contractual provisions they negotiated and agreed to in order to protect their interests in the very circumstances that they

---

[7] *See PEPCO v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000) ("much more restrictive" standard than for ratemaking); *Union Pacific Fuels v. FERC*, 129 F.3d 157, 168 (D.C. Cir. 1997) (Mobile-Sierra power justified "only where the public interest imperatively demands such action) (internal quote omitted); *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983) (burden "practically insurmountable"); *ACC Long Distance Corp. v. Yankee Microwave*, 10 FCC Rcd. 654, ¶ 17 (1995) ("heavy burden").

[8] *IDB Mobile Communications v. COMSAT Corp.*, 16 FCC Rcd. 11474, 11480 (2001).

[9] *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002).

[10] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 711 (D.C. Cir. 2000).

anticipated.[11] Thus, in this case, none of the conditions for overriding the terms of interconnection agreements are present.

In this regard, there is no substance to the RBOCs' reliance on *United Gas Improvement Co. v. Callery Props., Inc.,* 382 U.S. 223, 229 (1965). In that case, the FPC had unlawfully granted certificates that did not limit gas producers to charging prevailing rates, and after the FPC's Order was vacated for that reason, the Supreme Court held that the FPC could retroactively impose that limitation on the certificates. It held that "an agency . . . can undo what is wrongfully done by virtue of its order" that was vacated. But this principle is wholly inapposite here. The change of law provisions do not *implement* the prior unbundling rules that the RBOCs urge the Commission to supersede and vacate. To the contrary, the change of law provisions enable the RBOCs to seek *modification* of the interconnection agreements that were based on the to-be vacated rules. Nothing in *Callery* or its progeny justifies any attempt by the Commission to override the change of law provisions.

That is particularly so here, because the court of appeals decision in *USTA* did not establish that "the prior FCC rules [were] unlawful and contrary to congressional intent *ab initio."* RBOC Letter at 4. Rather, it held that the Commission's impairment standard was overbroad in one narrow respect, and otherwise faulted the prior orders for failing to provide specific explanations. As AT&T has explained in detail, the Commission can lawfully respond to *USTA* by reinstating its prior rules.[12]

---

[11] The RBOCs claim support from the Commission's imposition of a "fresh look" requirement on contracts between incumbent LECs and CMRS providers. RBOC letter at 3. There, the Commission found that the LECs had abused negotiating power to "impose[]" on CMRS providers contractual provisions "in violation of" Commission rules. *Local Competition Order*, 11 FCC Rcd. 15499, ¶¶ 1094-95. The "fresh look" requirement "addressed inequalities in bargaining power" that had led to this violation and enabled the victims of LEC market power abuses to "negotiate more equitable interconnection agreements." *Id.* at ¶ 1095. The RBOCs – which both have the market power and supported the provisions they now seek to avoid – obviously cannot point to any comparable basis to justify relieving them from their contracts. Moreover, the CMRS fresh look allowed CMRS providers immediately to take advantage of the reciprocal compensation rights that were *minimum* federal requirements. Here, by contrast, minimum federal unbundling requirements will remain in effect, and the change of law provisions afford State commissions an opportunity to determine if the vacatur of prior rules and the adoption of new rules requires elimination of access to particular network elements or whether access should continue to be required under provisions of state law that go beyond the minimum federal requirements.

[12] The RBOCs also seek to revive their arguments regarding eliminating the "pick and choose" rule under the guise of efficient implementation of the *Triennial Review Order*. They claim that competing carriers cannot take advantage of Rule 51.809 for delisted elements because Section

This letter is being filed electronically for inclusion in the above-noted dockets pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/ David Carpenter

David Carpenter

cc: Marsha MacBride
Christopher Libertelli
Matthew Brill
Lisa Zaina
Jordan Goldstein
Dan Gonzalez
William Maher
Scott Bergman
Michelle Carey
Thomas Navin
John Stanley
John Rogovin
Linda Kinney
Qualex International

---

252 applies only to "a request for … network elements pursuant to section 251" and because only interconnection obligations with "ongoing obligations relating to section 251(b) or (c) must be filed under section 252(a)(1)." RBOC letter at 6-7 (quotations omitted). These claims are wrong. Section 252(i) applies to any facility or feature that satisfies the definition of "network element" of 47 U.S.C. § 153(29), whether or not the Commission has mandated its provision under its unbundling rules, and § 252(a)(1) addresses which new interconnection agreements must be filed under section 252, not the access obligations, including the pick and choose rules, under existing interconnection agreements. AT&T has addressed the proper scope and operation of the pick and choose rule in its *ex parte* filing of Jan. 29, 2003. Contrary to the RBOCs' claim, the Commission's treatment of "pick and choose" rights in the *ISP Remand Order* is entirely irrelevant here. In the *ISP Remand Order*, the Commission prospectively eliminated the application of the "pick and choose" rule on the (since rejected) ground that section 251(b) reciprocal compensation obligations do not apply to interstate ISP-bound traffic. *Order on Remand*, 16 FCC Rcd. 9151, ¶ 82 (2001). In those circumstances, the RBOCs argue that Rule 51.809 is by definition inapplicable.